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ARMY INTERIM POLICY FOR INTEGRATING NATURAL RESOURCE INJURY RESPONSIBILITIES AND ENVIRONMENTAL RESPONSE ACTIVITIES

I. PURPOSE: This policy implements and supplements the *Department of Defense Interim Policy on Integration of Natural Resource Injury Responsibilities and Environmental Restoration Activities* (DoD Policy), 2 May 2000, and supplements Army Regulation 200-1 (AR 200-1) *Environmental Protection and Enhancement* (1997). Consistent with the Defense Environmental Restoration Program (DERP), as implemented by AR 200-1, this policy establishes Army roles and responsibilities for meeting the directives, goals, and objectives of the DoD policy.

II. DEFINITIONS: Definitions of all key terms used in this policy and guidance are provided in the attached Glossary.

III. APPLICABILITY:

- A.** This policy applies to response actions¹ initiated by the Army under the Defense Environmental Restoration Program (DERP) for which the Army serves as the lead response agent (see Glossary). Specifically, this policy applies to actions taken to address releases of hazardous substances (see Glossary) pursuant to CERCLA and RCRA Corrective Action² under (i) the Installation Restoration Program (IRP), (ii) the Base Realignment and Closure (BRAC) cleanup program, and (iii) the Formerly Used Defense Sites (FUDS)³ cleanup program.
- B.** This policy does not apply at third-party sites and FUDS where no Army-initiated response action is contemplated.⁴
- C.** This policy is limited to identification of, consideration of, and if appropriate, response to potential natural resource injuries (NRI - see Glossary) through compliance with DERP, CERCLA, the NCP, and AR 200-1. It does not

¹ This policy does not address the Army's role as a Natural Resource Trustee for purposes of assessing natural resource damages *following* remediation. During cleanup, the Army's Trustee role is narrowly limited to providing information pertaining to potential natural resource impacts and concerns to the lead response agent.

² For purposes of this policy, the CERCLA response process shall also include response to hazardous substance releases through the RCRA Corrective Action process where such response could have been taken under authority of either CERCLA or RCRA (i.e., under DERP).

³ The Army is never a Natural Resource Trustee at sites under the FUDS program. Therefore, the provisions of this policy and guidance addressing the Army's Trustee responsibilities do not apply to the FUDS program.

⁴ The Army should, as a potentially responsible party (PRP), participate in the remedy selection process at such sites by reviewing site plans and reports, and encourage consideration and selection of remedies that minimize residual natural resource injury (NRI) and reduce the potential for liability.

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address the assessment of Natural Resource Damages (NRD – see Glossary).

IV. POLICY: The Army will identify, consider, and where appropriate, mitigate NRI as it responds to releases of CERCLA hazardous substances in accordance with the directives and procedures set forth below.

- A.** The Army will (i) notify Natural Resource Trustees (see Glossary), including the Army Trustee, where there is the potential for NRI resulting from an Army release of a CERCLA hazardous substance, and (ii) coordinate studies, investigations and planning relating to both future and on-going response actions with Trustees in accordance with CERCLA, Section 104(b)(2).
- B.** The Army will also notify appropriate Army natural resource professionals (see Glossary) and coordinate response actions with them.
- C.** Army natural resource professionals will assist the BEC, PM, or RPM to ensure that natural resource impacts are appropriately identified and considered during the response process.⁵
- D.** If the Army determines that a release of a CERCLA hazardous substance may have resulted in NRI, it shall evaluate such NRI as part of any future or ongoing site investigation. NRI information shall be considered – along with all other relevant factors outlined in the NCP's nine criteria or similar RCRA corrective action guidance – when selecting the remedy.
- E.** The Army, when feasible, appropriate, and consistent with the NCP⁶, will develop and select response actions that limit potential NRI during remedy construction and operation.
- F.** The Army will mitigate NRI through performance of a response to CERCLA hazardous substances only when appropriate and consistent with DERP, CERCLA, the National Contingency Plan (NCP), and the funding purposes of the applicable appropriations (i.e., BRAC, ER,A and ER-FUDS).
- G.** Evaluation of NRI pursuant to this policy is intended to consider only the adverse ecological consequences related to past releases and potential response actions, where the decision-making process permits. It is not intended to and does not constitute a “determination of injury” or an

⁵ Natural resource professionals will also assist the BEC, PM, or RPM in identifying other natural resource requirements, such as the Endangered Species Act and Clean Water Act, that might be triggered by the release and/or the proposed response.

⁶ For purposes of response actions undertaken pursuant to RCRA Corrective Action authority, reference to NCP and its remedy selection criteria shall mean RCRA Corrective Action Guidance published by the Environmental Protection Agency.

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admission of liability for compensable natural resource damages (NRD; see Glossary).

- H. The Army will not assess NRD through the CERCLA response process. In particular, it will not use DERP funds (i.e., ER,A; BRAC; and ER-FUDS) to: (i) enhance or restore natural resources beyond CERCLA restoration or remediation requirements; or (ii) compensate Trustees or parties impacted by the injury by providing direct compensation (e.g., payment of monetary damages) or indirect compensation (e.g., performing restoration activities that have the principal effect of compensating Trustees or parties impacted by the injury).
- I. The Army will not use appropriated funds to compensate Trustees for coordination pursuant to CERCLA, Section 104(b)2.

V. POLICY IMPLEMENTATION RESPONSIBILITIES

- A. ***Deputy Assistant Secretary for Environment Safety and Occupational Health (DASA (ESOH))***. DASA (ESOH) is responsible for acting as the Army Natural Resource Trustee. In addition, as the proponent of this policy, DASA (ESOH) is responsible for its oversight and implementation, as well as issuance of waivers.
- B. ***Assistant Chief of Staff for Installation Management (ACSIM)***. The ACSIM, through the Director of Environmental Programs (DEP) and with the assistance of the Commander, US Army Environmental Center (AEC) regarding active and BRAC installations, and HQ USACE regarding FUDS, is responsible for executing this policy and providing necessary technical guidance.
- C. ***Army Major Commands (MACOMs)***. MACOMs are responsible for ensuring that this policy is distributed to and implemented at installations under their command or at sites for which they bear responsibility as the CERCLA lead response agent (e.g., FUDS). MACOMs will also provide for natural resource professional staff coordination where such capabilities are lacking at the installation.
- D. ***Installation Commanders (ICs), BRAC Environmental Coordinators (BECs) and Remedial Program Managers (RPMs)/Project Managers (PMs)***. ICs, BECs, RPMs, and FUDS PMs, as Lead Response Agent officials, are responsible for implementing this policy as they respond to releases at sites for which they have environmental responsibility on behalf of the Army. In particular, ICs, BECs, RPMs, and FUDS PMs are responsible for:

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1. identifying natural resources potentially injured by a release of CERCLA hazardous substances for which the Army bears responsibility, or by a response to such a release;
2. notifying natural resource trustees of potential natural resource injuries;
3. coordinating future and on-going response action studies, investigations, and planning with Trustees, including Army natural resource professionals;
4. integrating, when appropriate, NRI considerations into CERCLA remediation documents, such as on-going or future ERAs or remedial investigations;
5. encouraging consideration and selection of remedial actions that address past NRI and minimize or avoid additional NRI through implementation, consistent with the NCP or similar RCRA corrective action guidance;
6. ensuring that Army natural resource professionals provide assistance to the BECs, PMs and RPMs in considering impacts to natural resources; and
7. considering impacts to natural resources, when appropriate, prior to responding to an Army release of a CERCLA hazardous substance.

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GLOSSARY

This section presents definitions for all key terms used in this policy.

- **Army Natural Resource Professional:** an individual with an undergraduate or graduate degree in natural resource management sciences, and who has responsibility for supporting natural resource management on Army lands. Such individuals may be Department of the Army civilian employees, contractors, or other individuals providing natural resource management support on Army lands through interagency agreement, cooperative agreement, or similar arrangements.
- **CERCLA Hazardous Substance:** any substance defined as a hazardous substance in 42 U.S.C 9601(14). For additional information, see 40 CFR 302.
- **Lead Response Agent:** for purposes of this policy, the individual who is responsible for carrying out the Army's duties as the CERCLA lead agent for a response at a DERP site.
- **Natural Resource:** for purposes of this policy, all land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States, any State or local government, any foreign government, any Indian tribe, or if such resources are subject to a trust restriction on alienation, any member of an Indian tribe. This definition is used specifically for this NRI policy and guidance instead of the definition for "natural resource" in Army Regulation 200-3 *Natural Resources – Land, Forest and Wildlife Management*, Glossary, p. 32.
- **Natural Resource Damages:** the liability – either in money damages or other forms of compensation – recovered by a Natural Resource Trustee in the adjudication or settlement of a legal claim regarding NRI. Natural resource damages (NRD), as distinguished from NRI, are residual to cleanup. (This means that a Trustee cannot initiate a legal claim until after cleanup or, if appropriate, after remedy selection.) Further, NRD can only be used by a Trustee to restore, replace, or acquire the equivalent of natural resources injured by the release of a CERCLA hazardous substance which occurred after December 11, 1980. See CERCLA, Section 107(f), 42 U.S.C. §9607(f). Finally, NRD involves a claim against the United States which can only be filed after completion of the remedy. See CERCLA, Section 113(g)(1). These damages must be paid from the Judgment Fund rather than directly from agency appropriations.
- **Natural Resource Damages Assessment:** the process by which Trustees determine, after remedy selection, whether the release of a CERCLA hazardous substance has resulted in NRI, quantify the level of injury and resultant loss of

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services, and assess a monetary value for the Trustee to repair, replace, or acquire the equivalent of the injured natural resource. See CERCLA, Section 113(g)(1).

- **Natural Resource Injury:** a measurable adverse change, either long- or short-term, in the chemical or physical quality or the viability of a natural resource resulting either directly or indirectly from exposure to the release of a CERCLA hazardous substance, or as a result of the response to such a release.
- **Natural Resource Trustee:** any Federal agency designated in the NCP in Section 600.300 as having Natural Resource Trustee responsibilities pursuant to CERCLA, Section 107(f)(2)(B); any State agency designated by the Governor of each State pursuant to CERCLA, Section 107(f)(2)(B); or an Indian tribe that may commence an action under CERCLA, Section 126(d). The Army is a Natural Resource Trustee for land and natural resources under its jurisdiction, management, and control. In addition to providing valuable input into development and selection of remedies, Trustees are authorized to assess NRDs and bring claims against PRPs. The Army is not a Trustee at FUDS or third-party sites because these properties are no longer, or were never, under DoD jurisdiction, management, or control.